



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Usatrex International, Inc.

**File:** B-231815, B-231815.2, B-231815.3

**Date:** October 14, 1988

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### **DIGEST**

1. Protest that another offer was submitted late and therefore should have been rejected is untimely where protester was aware of the basis for protest at least 3 months before raising the issue.
2. Issue concerning former agency employee's employment by company awarded contract is untimely when filed more than 10 working days after the protester should have been aware of the basis for protest.
3. Protest that the agency should have rejected the awardee's proposal because it found the proposed project manager unacceptable is denied where the record indicates that the awardee's proposed project manager in fact was acceptable to the agency.
4. Whether in performing a contract the contractor violates a requirement that 50 percent of the personnel costs of the contract be attributed to the prime contractor is a matter of contract administration, which the General Accounting Office does not consider as part of its bid protest function.

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### **DECISION**

Usatrex International, Inc., and Professional Management Associates, Inc. (PMA), protest the award of a contract to Danville Research Associates, Inc. under request for proposals (RFP) No. DE-RP03-88SF17290, issued by the Department of Energy (DOE) for technical and administrative support services for the Safeguards and Security Division of DOE's San Francisco Operations Office. Usatrex and PMA allege that Danville's proposal was filed late and should have been rejected. Usatrex also argues that (1) DOE violated its own conflict of interest regulations with

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respect to a former employee's participation in the procurement as a representative of Danville, and the former employee influenced the designation of the procurement as a small business set-aside, and (2) DOE improperly evaluated Danville's proposal with respect to key personnel and limits on the use of subcontractor personnel.

We dismiss the protests in part and we deny them in part.

The RFP was issued as a small business set-aside on November 12, 1987. The solicitation noted that proposals were to be received at the San Francisco Operations Office of DOE no later than 3:00 p.m. local time on December 29, 1987. By letter of December 16, DOE changed the closing date for receipt of proposals to January 11, 1988, 3:00 p.m. local time, and provided the following to all offerors: Amendment No. 1; a list of questions submitted and official answers incorporated and made a part of amendment No. 1; a list of preproposal conference attendees; and transcripts of the presentations made at the preproposal conference by DOE officials. One of the presentation transcripts included a statement made by the legal adviser to the proposal evaluation panel on December 8 (when the due date still was December 29), that proposals had to be received at room 760 (the seventh floor mail room) of the San Francisco Operations Office no later than 3:00 p.m. local time on December 29, 1987.

DOE received five proposals in response to the RFP; three proposals were determined to be in the competitive range, including those of Usatrex and Danville. DOE awarded a contract to Danville on June 20, 1988, and made the determination to proceed with contract performance without waiting for our decision on June 24.

Usatrex and PMA first protest that Danville's hand-delivered proposal was not received, or time/date stamped, at the seventh floor DOE mail room by the 3:00 p.m. closing time for receipt of proposals, as required by the statement of the DOE legal adviser. The protesters state that, according to their witnesses, Danville's proposal was delivered late and to the wrong place, the guard desk at DOE's offices on the sixth floor of the building, and argue that the time (3:00 p.m.) handwritten on the proposal by the DOE security guard was inadequate proof of timely receipt by the agency.

DOE argues that the protest is untimely, asserting that by virtue of Usatrex's and PMA's own submissions and observations, the protesters had knowledge of DOE's acceptance of Danville's proposal as of January 11, 1988, the closing date for receipt of proposals. Moreover, DOE has submitted a

notarized affidavit from the contracting officer stating that within 10 days of March 29, 1988, the contracting officer, in response to a telephone call from Usatrex, informed Usatrex that Danville had been included in the competitive range and that DOE had accepted Danville's proposal as received before the closing time for receipt of proposals.<sup>1/</sup>

We agree with DOE on the issue of the lateness of Danville's proposal. A protest of other than apparent solicitation improprieties must be filed within 10 working days after the basis for protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1988). Usatrex and PMA were aware of DOE's acceptance of Danville's proposal, as stated in their own affidavits, on January 11, the closing date for receipt of proposals. Those affidavits specifically acknowledge that the protesters overheard the contracting officer tell the security guard on the sixth floor that she would accept Danville's proposal if it had been delivered to the guard's desk at 3:00 p.m. and that the protesters observed that Danville's proposal had been hand-marked with the notation "3:00 p.m." In addition, Usatrex has not refuted DOE's sworn contention that the contracting officer informed Usatrex of DOE's acceptance of Danville's proposal on March 29. Usatrex and PMA did not protest this issue to our Office until June 27 and July 5, respectively (after notification of award on June 21), at least 6 months after the basis for their protests was known. Therefore, the protests are untimely on this issue and will not be considered.

Usatrex next argues that DOE's conflict of interest regulations have been violated because a former DOE employee appeared at the preproposal conference for the procurement on behalf of Danville only 6 weeks after leaving DOE. Usatrex also alleges that the former employee influenced DOE's determination to change the designation of this procurement from unrestricted, as it was originally announced in the August 28, 1987, issue of the Commerce Business Daily, to a small business set-aside.

DOE responds that the issue should be dismissed as untimely. DOE states that the preproposal conference attended by the former employee was held on December 8, and that a list of attendees at the conference, which identified the former

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<sup>1/</sup> It was DOE's position that the offer was presented to the guard before 3:00 p.m., and that it did not have to be delivered to the mailroom by then to be on time.

employee as representing Danville, was provided to Usatrex on or about December 16.

We also find the issue untimely. The documents provided to Usatrex by DOE on December 16, 1987, clearly indicate that the former employee was representing Danville at the preproposal conference, but this issue was not raised by Usatrex until June 27, 1988. See 4 C.F.R. § 21.2(a)(2). In any case, the mere fact that a former government employee is subsequently employed by a company awarded a contract by the employee's former agency is an insufficient basis to challenge the award where there is no evidence that the former employee improperly influenced the award. Holsman Services Corp., B-230248, May 20, 1988, 88-1 CPD ¶ 484. Here, Usatrex has not substantiated with any evidence whatsoever its allegation that the former employee influenced the designation of the procurement as a small business set-aside and has presented no evidence with respect to any DOE regulations that allegedly were violated by the former employee's representation of Danville. Moreover, the former employee categorically states that her DOE employment involved computer services and had no connection with DOE's Security and Safeguards Division's procurement, and that she cleared her employment with Danville with DOE's Office of Chief Counsel for the San Francisco Operations Office for any possible conflict of interest. Under the circumstances, we have no reason to question her statement.

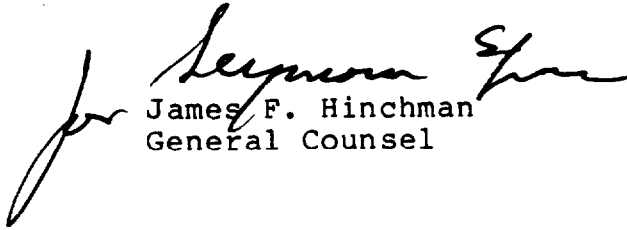
Usatrex's final argument is that DOE improperly evaluated Danville's proposal since, according to Usatrex, DOE found the firm's proposed project manager unacceptable, and Danville therefore basically did not have a project manager as required by the RFP. Usatrex also contends that the use of an employee of Danville's subcontractor as acting project manager violates the RFP requirement that the prime contractor be responsible for at least 50 percent of the contract's personnel costs.

The RFP provided that all offerors were to designate key personnel for the project, including a project manager. According to DOE, Danville identified an acceptable project manager in its proposal. However, following contract award, the proposed project manager declined employment with Danville, and Danville subsequently appointed an acting project manager, an employee of Danville's subcontractor, to serve in that capacity until a substitute project manager could be hired.

Our review of the record indicates that Danville did in fact propose a project manager committed to the contract who was acceptable to DOE. Accordingly, DOE did not improperly

evaluate Danville's proposal with regard to the requirement for a project manager, and we deny Usatrex's protest on this issue. In addition, whether Usatrex is violating the RFP (now contract) requirement that 50 percent of personnel costs be attributed to the prime contractor by having a subcontractor employee serve as acting project manager is a matter of the administration of an existing contract, which we do not consider as part of our bid protest function. 4 C.F.R. § 21.3(m)(1).

The protest is dismissed in part and denied in part.

  
James F. Hinchman  
General Counsel